

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

CASE NO. C17-94 RAJ

ORDER

This matter comes before the Court again on Plaintiffs' Motion to Compel re Deliberative Process Privilege. Dkt. # 152. On May 21, 2018, the Court granted in part Plaintiffs' Motion, but reserved ruling on portions of the Motion pending supplemental briefing from the parties. Dkt. # 189. The parties have submitted supplemental briefing, and the Court has held a telephonic conference with the parties to discuss the status of this Motion. Dkt. ## 194, 198, 199, 211. For the reasons stated below, the Court **GRANTS IN PART, DENIES IN PART, AND RESERVES RULING IN PART** on Plaintiffs' Motion.

In the Court's previous Order, the Court granted Plaintiffs' Motion to Compel as to a number of documents the Court determined were not shielded by the deliberate process privilege. Dkt. # 189 at 9. The Court determined that the Plaintiffs did not

1 previously have access to the Emrich Affidavit (Dkt. # 174-3), and ordered the parties to
2 submit supplemental briefing whereby Plaintiff could more precisely challenge the
3 remaining privilege assertions. *Id.*

4 In their supplemental briefing, the parties identified only two additional sets of
5 documents to be subject to Plaintiffs' Motion: (1) documents identified in Paragraph 17
6 of the Emrich Affidavit; and (2) documents identified in Paragraph 45 of the Emrich
7 Affidavit. Dkt. ## 194, 198. The parties clarified, first in Defendants' supplemental
8 brief, and again in Plaintiff's supplemental reply, that Plaintiffs no longer seek documents
9 identified in Paragraph 45. In the telephonic conference on December 18, 2018, the
10 parties again confirmed that they had narrowed this dispute to one category of
11 documents, certain pre-CARRP draft policy memoranda listed in Paragraph 17 of the
12 Emrich affidavit (Dkt. # 174-3). Accordingly, the Court **DENIES** Plaintiffs' Motion to
13 Compel as to the documents identified in Paragraph 45 of the Emrich Affidavit.

14 As for the Paragraph 17 documents, the parties' supplemental briefing also
15 indicated that they agreed that an *in camera* review of the remaining documents would be
16 necessary. Defendants explained that they had "no objection to providing some or all of
17 the Paragraph 17 documents to the Court for *in camera* review." Dkt. # 198 at 12.
18 Defendants also noted that to "minimize the burden on the Court, Defendants suggest it
19 would be most efficient to present the Court with a randomly-selected sample of 10 draft
20 policy memoranda for review, which would include approximately 200 pages." *Id.* The
21 parties' representations to this Court in the December 18, 2018 status conference were
22 consistent with this proposed procedure, and the Court approved of this approach. Dkt. #
23 211.

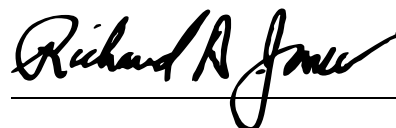
24 Notwithstanding this representation, the parties filed a joint status report on
25 December 21, 2018 that noted that the parties agreed that "Defendants will submit, no
26 later than Friday, December 28, 2018, four documents previously shared with Plaintiffs
27 during the parties' deliberative process privilege negotiations for the Court's *in camera*

1 review in relation to Dkt. #152.” Dkt. # 212 at 2. Due to the lapse in appropriations,
2 Defendants’ submission of the four documents occurred instead on February 5, 2019.
3 Dkt. # 218.

4 The Court has reviewed the documents produced by Defendants. Based on what
5 Defendants have provided, the Court cannot determine if all the Paragraph 17 documents
6 are subject to the deliberative process privilege. The Court has concerns that because
7 these documents were not randomly selected from the Paragraph 17 documents, they do
8 not reliably represent the group as a whole. The Court was satisfied with the
9 randomization procedure the parties had previously agreed to, and did not authorize this
10 new procedure of providing four seemingly hand-picked unprivileged documents. As to
11 the four documents already submitted, however, the Court finds that any privilege has
12 been waived and **GRANTS** Plaintiff’s Motion to Compel as to these documents.

13 At this point, the Court concludes that additional *in camera* review is needed to
14 fully rule on Plaintiffs’ Motion to Compel. The Court hereby **GRANTS IN PART,**
15 **DENIES IN PART, AND RESERVES RULING IN PART** Plaintiff’s Motion to
16 Compel. The Court **DENIES** Plaintiff’s Motion to Compel as to the Paragraph 45
17 documents, and **GRANTS** Plaintiff’s Motion to Compel as to the four Paragraph 17
18 documents already produced. Within fourteen (14) days of this Order, Defendants are
19 instructed to produce a randomly-selected sample of 10 documents from Paragraph 17 of
20 the Emrich Affidavit for *in camera* review for this Court. Defendants must provide with
21 this production an additional submission from the relevant custodian attesting to the
22 randomization process used to select these documents.

23 Dated this 27th day of February, 2019.

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26 The Honorable Richard A. Jones
27 United States District Judge